UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JARROD STRINGER, et al. Plaintiffs, v. ROLANDO PABLOS, in his official capacity as Texas Secretary of State and STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety	Civil Action Case No. 5:16-cv-00257-OLG CONSOLIDATED WITH
JARROD STRINGER, et al. Plaintiffs, v. RUTH HUGHS, in her official capacity as Texas Secretary of State and STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety Defendants.	Civil Action Case No. 5:20-cv-00046-OLG

TEXAS DEMOCRATIC PARTY, DSCC, AND DCCC'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FOR SUMMARY JUDGMENT

Defendants' penchant for delay continues. Faced with a motion *for leave to file* for summary judgment, Defendants insist on wasting the Court's limited resources by rehashing arguments unrelated to the pending motion. The only issue at this time is whether Intervenors *may file* a motion; the merits of the motion are not yet before the Court. Defendants do not address this issue and instead try to yet again urge reconsideration of the Court's order granting intervention. Defendants do not raise a single colorable argument against permitting Intervenors to *file* a motion for summary judgment. Intervenors' motion for leave to file for summary judgment should be granted.

I. ARGUMENT

A. Intervenors have shown good cause for seeking to file a motion for summary judgment.

Intervenors moved for summary judgment as soon as practicable, and the Court should grant the motion for leave to file for summary judgment. To be sure, under Rule 56(b), a party may file a motion for summary judgment "at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). However, Rule 16(b)(4) permits a party to file a motion outside the deadlines prescribed "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Intervenors sought intervention at the soonest possible moment[1]—shortly after the case returned to the district court following the Fifth Circuit's ruling—and could not file a motion for summary judgment until intervention was granted. At the time that Intervenors were granted intervention into *Stringer I*, the discovery period had already closed. Therefore, Intervenors have no choice but to pursue a motion for summary judgment outside the limits set forth in Rule 56(b), and filed their motion for leave to file a motion for summary judgment a mere *seven days* after being granted intervention.

[1] Indeed, the Court granted Intervenors' motion to intervene, which argued, in part, that intervention was timely because Plaintiffs were adequately representing Intervenors' interests until the Fifth Circuit's holding regarding standing. ECF No. 124 at 10.

Defendants have not even attempted to argue why this was improper or why these circumstances do not demonstrate "good cause" for filing outside of Rule 56(b)'s limits.

The only inquiry here is whether Intervenors *may file* a motion for summary judgment. This distinction is important because Defendants' opposition is not in response to Intervenors' motion for leave to file but is rather a preview of their arguments in opposition to the merits of the motion for summary judgment. The Court should not entertain these premature arguments and should grant the pending motion for leave to file, allowing the parties to properly brief the merits of the motion for summary judgment.

B. Defendants' opposition is another veiled attempt at a motion to reconsider the Court's decision granting intervention.

Like the motion to sever, Defendants' opposition is another veiled attempt to persuade the Court to reconsider its order granting intervention and further delay this litigation. *See* ECF No. 142 (Defendants' Motion to Sever), ECF No. 160 at 2, 3-4 (identifying the Motion to Sever as a veiled motion for reconsideration). Defendants' refrain is now familiar: they argue that the mandate rule required the Court to dismiss *Stringer I* after remand from the Fifth Circuit and that Intervenors may not continue to litigate *Stringer I* despite that they have established standing. *See, e.g.*, ECF No. 133 (opposing the Motion to Intervene). The Court considered these arguments and rejected them, granting the Motion to Intervene. ECF No. 136 (stating that the Court reviewed the briefs and applicable law, "and finds that the motion to intervene should be granted[.]").[2] Defendants failed to properly seek reconsideration of the Court's order granting intervention, likely because they are unable to meet high bar for reconsideration set forth in Rules 59(e) and

[2] Notably, despite having their opposing arguments rejected, Defendants cite to their Opposition to the Motion to Intervene as if that brief is viable. *See* ECF No. 161 at 3 (citing ECF No. 133).

60(b). *See* ECF No. 160 at 4 (arguing that Defendants' did not meet the reconsideration standards required by the Fifth Circuit); *see also Fret v. Melton Truck Lines, Inc.*, No. SA-15-CV-00710-OLG, 2017 WL 5653905, at *2 (W.D. Tex. Feb. 13, 2017).

To the extent the Court reconsiders the underlying arguments about intervention, Intervenors incorporate here the arguments in their motion to intervene, supporting reply brief, and opposition to Defendants' motion to sever. *See* ECF Nos. 124, 125, 134, 160. It is worth emphasizing that rehashing these arguments in an opposition to a motion for leave to file is inappropriate and wholly irrelevant to the matters at hand. But seeking a second bite of the apple without a legal basis for doing so appears to be Defendants' *modus operandi* here. *Compare, e.g.*, ECF No. 157 at 44:5-6 ("[W]e all must begin anew with the new claims of the new parties.") *with* ECF No. 151-1 at 13-19 (explaining that either law of the case or collateral estoppel bars Defendants from relitigating the merits of their equal protection violation.).

The plain language of the Fifth Circuit's narrow mandate only required the Court to dismiss Plaintiffs' claims for lack of standing. ECF No. 122 at 12. The Court did just that. See ECF No. 139. The Fifth Circuit's mandate does not preclude Intervenors—who have standing—to litigate the merits of the equal protection claim. *See Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167-68 (1939); *N.Y. State Nat. Org. for Women v. Pataki*, 228 F. Supp. 2d 420, 428 (S.D.N.Y. 2002). And because Intervenors intervened into *Stringer I*,[3] they may rely on the record in *Stringer I*.

[3] A note about timing is warranted. Intervenors moved to intervene into *Stringer I* on December 20, 2019. Plaintiffs filed a separate lawsuit— *Stringer II*—on January 14 and were consolidated into *Stringer I* on January 21, 2020. That same day, the Court granted the motion to intervene. Although *Stringer I* and *Stringer II* are consolidated, Intervenors specifically intervened into *Stringer I* and therefore are proceeding based on its record, and not on the record in *Stringer II*. Contrary to Defendants' response, ECF No. 161 at 2, the Court did *not* grant intervention into the newly consolidated case. The Court granted intervention into the case in which intervention was sought, which is *Stringer I*.

Defendants' arguments to the contrary are unfounded and based only on the argument that the mandate rule required the Court to dismiss *Stringer I*, an argument that this Court already rejected.

Even if the Court were to find that the mandate rule applies—and it should not—the Court may exceed the mandate here because Intervenors' new evidence regarding standing is substantially different than what was before the Fifth Circuit. The mandate rule is "a specific application of the general doctrine of law of the case." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). Like the doctrine of law of the case, the mandate rule is subject to three exceptions: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice. *Id*. Intervenors fall comfortably within the first exception. The Fifth Circuit analyzed Plaintiffs' standing, but now Intervenors submit substantially different evidence of their own standing. Therefore, the first exception to the mandate rule applies, permitting the Court to exceed the mandate requiring dismissal, and allowing the merits of the claim to move forward.

C. Defendants are not entitled to discovery.

Defendants are not entitled to discovery because they failed to show that further evidence is necessary to respond to the motion for summary judgment. If a nonmovant claims that it is missing facts essential to justify its position, then Rule 56(d) requires the nonmovant to provide affidavits or declarations proving as much. Fed. R. Civ. P. 56(d). Not only have Defendants failed to provide the required affidavits or declarations, they have not established what additional evidence is necessary to refute the motion for summary judgment. As an initial matter, Intervenors' equal protection claim is nearly identical to Plaintiffs' Equal Protection claim, is based on the record in this case, and the law of the case doctrine or the doctrine of collateral estoppel preclude

Defendants from arguing that their conduct does not violate equal protection. ECF No. 151-1 at 17-24. No additional discovery is warranted regarding the Equal Protection claim. And to prove they have standing to bring this claim, Intervenors submitted affidavits detailing how Defendants' conduct causes direct injury. *See DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529-30 (5th Cir. 2005) (finding that affidavits are "competent summary judgment evidence."); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc*., 73 F.3d 546, 556 (5th Cir. 1996) (holding that affidavits "are sufficient to satisfy the 'injury in fact' prong" of the standing analysis); *Johnson v. UAH Prop. Mgmt., Ltd. P'ship*, 428 F. App'x 311, 312 (5th Cir. 2011) (holding that the affidavits were competent summary judgment evidence because they "were based on the declarants' personal knowledge and participation in the events at issue[.]"). Intervenors presented sufficient evidence for purposes of summary judgment. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (holding that "Article III injury-in-fact need not be substantial," and a "an identifiable trifle" will suffice) (quotations omitted)); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-1342 (11th Cir. 2014) (holding affidavits regarding organizational resources diverted to counteract program for removing purported non-citizens from voting rolls sufficient to grant standing). Defendants' frivolous request to open discovery is yet another delay tactic that this Court should reject.

II. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant Intervenors' Motion for Leave to File for Summary Judgment (ECF No. 151) and enter an order filing Motion for Summary Judgment.

Dated: February 11, 2020.

Respectfully submitted,

/s/ *Emily Brailey*

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I filed a copy of the foregoing Texas Democratic Party, DSCC, and DCCC's Reply in support of Motion for Leave to File with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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